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No. 90-1608

IN THE

Supreme Court of the United States

October Term, 1990

LENORA B. FULANI, *et. al.*,

Petitioners,

vs.

JOSEPH H. HOGSETT, in his official capacity as Secretary of the State of Indiana, *et al.*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly applied the doctrine of laches to bar relief in this case.

2. Whether the District Court correctly decided that Petitioners failed to present an actual case or controversy, Petitioners failed to allege any facts sufficient to establish a deprivation of their civil rights, and that Petitioners' claim was moot.

PARTIES TO THE PROCEEDINGS

The petitioners, who were plaintiffs and appellants below, are Lenora B. Fulani, Mamie Moore, Lenora B. Fulani's Committee for Fair Elections, New Alliance Party, Julie Joy and Mary Forrest (hereinafter "Fulani Plaintiffs").

The respondents, who were defendants and appellees below, are Joseph H. Hogsett, Secretary of the State of Indiana; the State Election Board of Indiana; Evan Bayh, Governor of Indiana; and Alan Mills, Timothy Durham, and Robert L. Wright, Members of the Indiana State Election Board (hereinafter "State Defendants");[1] and Carlton E. Curry, intervenor-defendant-appellee below.

[1] Prior to the conclusion of this case in the Court of Appeals, all of the original defendants, who were sued in their official capacities only, were succeeded in their respective offices by the above named respondents. Therefore the above respondents were automatically substituted as parties under FED. R. APP. P. 43(C)(1). *See Fulani v. Hogsett*, 917 F.2d 1028 (1990).

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

Fulani Plaintiffs seek review of the Seventh Circuit's affirmance of the District Court's dismissal of their complaint for declaratory and injunctive relief and damages, filed pursuant to 42 U.S.C.§1983.

B.
COURSE OF PROCEEDING BELOW

Fulani Plaintiffs filed their five count Complaint pursuant to 42 U.S.C. §1983, on October 18, 1988. Petitioners alleged a violation of their right to political speech, equal protection of the law, discrimination against their political program and beliefs, discrimination on the basis of their race and sex, violation of their right to free speech and association, and violation of Indiana election law. State Defendants filed their Motion to Dismiss the Complaint on October 21, 1988. Intervening Defendant, Carlton E. Curry, filed his Motion to Dismiss on October 20, 1988.

On October 25, 1988 the District Court granted the motions to dismiss and dismissed the Complaint in its entirety. The United States Court of Appeals for the Seventh Circuit affirmed the District Court on November 8, 1990.

C.
FACTS RELEVANT TO ISSUE PRESENTED

The pertinent facts of the case were never in dispute and were submitted to the District Court by joint stipulation of the Parties.[2] At the time this suit was initiated Indiana law required that the names of all candidates for presidential electors were to be certified to the Secretary of State by noon on August 1, before the general election. The names of the Presidential and Vice-Presidential candidates had to be certified to the Secretary of State before noon, September 1, before the general election. IC 3-10-4-5(c).[3] App. 16a.

The Fulani Plaintiffs certified the names of their candidates for presidential electors to the Secretary of State prior to

[2] All references to the facts and opinions below are to the appendix contained in the Petition for Writ of Certiorari and are cited to the appropriate page thereof as, "App. a."

[3] The statute has since been amended to require that the names of the electors and the candidates both be certified to the Secretary of State by noon on September 1, preceding the general election. IC 3-10-4-5(c).

August 1, 1988 and certified the names of their candidates for President and Vice-President to the Secretary of State prior to September 1, 1988. App. 16a.

The Republican Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 4, 1988. The Democratic Party candidates for presidential electors were not certified to the Indiana Secretary of State until August 8, 1988. Both the Democratic and Republican Party candidates for presidential electors were however, properly selected under Indiana law at their respective state conventions prior to August 1, 1988. The Presidential and Vice-Presidential candidates for both the Republican and Democratic Parties were duly certified to the Secretary of State prior to the September 1, 1988 deadline. App. 17a.

The names Fulani and Moore as candidates for the New Alliance Party for President and Vice-President of the United States, along with the names of Michael Dukakis and Lloyd Bentson for the Democratic Party and George Bush and Dan Quayle for the Republican Party appeared on the Indiana ballot for the November 8, 1988 general election.

The Fulani Plaintiffs filed suit on October 18, three weeks prior to the polling date for the 1988 presidential election and sought declaratory and injunctive relief to remove the names of both the Republican and Democratic candidates for President and Vice-President from the ballot in Indiana. By that time, the ballots had already been printed and absentee voting had already begun. IC 3-11-4-13; IC 3-11-10-26. The Fulani Plaintiffs also sought monetary damages.

The Fulani Plaintiffs claimed that allowing the Republican and Democratic candidates on the ballot, without their electors having been certified by August 1, violated their right to political speech, to hold political beliefs and espouse programs, and to equal protection under the First and Fourteenth Amendments. The Fulani Plaintiffs also attempted to invoke the court's pendent jurisdiction over a state law claim. The

Fulani Plaintiffs' central claim throughout their Complaint was:

> Upon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion or failed to comply with the requirements of the Indiana Election Code in any other respect, Fulani and Moore would not have been listed on the Indiana ballot. App. 19a.

This allegation was realleged in each of the claims for relief.

The District Court found that because the Fulani Plaintiffs' Complaint was premised upon a hypothetical situation about what the State Defendants might have done in a different factual setting, it failed to present the court with an actual case or controversy for adjudication. Therefore, the trial court held that it was without subject matter jurisdiction to hear the case under Article III of the Constitution. The District Court also found that the Complaint failed to present a claim upon which relief could be granted under equal protection analysis because: (1) the claim was moot to the extent that the Fulani Plaintiffs' candidates had in fact been listed on the ballot, (2) due to its hypothetical nature, the claim failed to present an actual case or controversy for adjudication, and (3) the Fulani Plaintiffs failed to allege any facts to show intentional or purposeful discrimination on the part of the State Defendants. The District Court further found that the Fulani Plaintiffs failed to show that any action by the State Defendants deprived the Fulani Plaintiffs of a federally secured right under either the First or the Fourteenth Amendments and failed to allege any facts to show that the State Defendants discriminated against the Fulani Plaintiffs on account of their sex or race. Having found no independent federal subject matter jurisdiction, the District Court dismissed the state law claim. The District Court noted, but did not rule, that given the timing of the suit and the election, the State Defendants presented a strong argument for the application of laches. The District Court dismissed the Complaint in its entirety.

The Fulani Plaintiffs appealed the District Court's decision to the Seventh Circuit. The Seventh Circuit found that the claims for declaratory relief and monetary damages presented a live controversy between the parties and were not moot. The Seventh Circuit further found that the Fulani Plaintiffs had standing to sue. In doing so the Seventh Circuit found that the increased competition the Fulani Plaintiffs had to face was an injury, fairly traceable to the actions of the State Defendants, which could be remedied by an award of damages to redress the increased outlay of campaign money.

However, the Seventh Circuit ruled that the claim was barred by laches. The Seventh Circuit noted that the action taken by the Secretary of State, which formed the basis of the Complaint, was taken and available for public inspection in August and early September, 1988. The Seventh Circuit then held that the failure of the Fulani Plaintiffs to file their Complaint until October 18, 1988, after the ballots were printed and absentee voting had begun, was fatal to their claim for any relief. Because the Seventh Circuit disposed of the case on laches, it did not reach the merits of the other issues involving equal protection, section 1983 or pendent jurisdiction.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE SEVENTH CIRCUIT'S APPLICATION OF LACHES TO BAR ALL RELIEF IN THIS CASE WAS PROPER AND IS CONSISTANT WITH PRIOR DECISIONS OF THIS COURT.

The Seventh Circuit found that the Fulani Plaintiffs' failure to file their Complaint until October 18, 1988, three weeks prior to the November 8 general election, when the actions of the State Defendants were taken and available for public inspection as early as August 1988, prejudiced the State Defendants. The Seventh Circuit noted the extreme difficulty, if not impossibility, of providing another set of ballots at that late date along with the confusion and risk of interference with the rights of the absentee voters as the prejudice caused by the

unwarranted delay. App. 10a-11a. The application of laches in such a case is consistent with this Court's decision in *Williams v. Rhodes*, 393 U.S. 23, 24-35 (1968). While the Seventh Circuit could have addressed the merits of the Complaint for Declaratory Relief, there was no requirement that it do so. The Fulani Plaintiffs were asking the Seventh Circuit to rule on either the constitutionality of the hypothetical set of facts that never took place, nor likely to take place in the future, or a question of purely state law. The Seventh Circuit's failure to address the claim for declaratory relief is certainly not worthy of this Court's review.

II. PETITIONERS' EFFORT TO OBTAIN EQUITABLE RELIEF WITH RESPECT TO THE 1988 ELECTION IS NOW MOOT AND THEIR REQUEST FOR MONETARY DAMAGES IS BARRED BY THE ELEVENTH AMENDMENT.

Before the filing of the appeal to the Seventh Circuit, the 1988 Election was held, presidential electors from Indiana were elected, the electors cast Indiana's twelve Electoral Votes for the Republican nominees for President and Vice-President, the Electoral College as a whole has elected George Bush and Dan Quayle President and Vice-President, and they have now been sworn into those offices.

Hence, to the extent the Fulani Plaintiffs seek review of the denial of their request for injunctive or other equitable relief with respect to the 1988 election, the issue is now moot. *See Giertsen v. Board of Election Commissioners of City of Chicago*, 751 F.2d 199, 202 (7th Cir. 1984) (appeal from injunction preventing enforcement of election law requirement in primary election dismissed as moot, because primary election had been held since the filing of the appeal). *See also Timms v. Metropolitan School District of Wabash County, Indiana*, 722 F.2d 1310, 1314 (7th Cir. 1983) ("It is settled that our jurisdiction requires 'an actual controversy . . . to exist at all stages of the appellate review'") (citation omitted) (affirming dismissal of

handicap discrimination claim under, *inter alia*, 42 U.S.C. §1983, and holding that appeal of request for injunction to prevent child's exclusion from instruction program was mooted when she passed maximum age of program eligibility).

The Fulani Plaintiffs cannot avoid mootness by invoking the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). The circumstances of this case, both the major parties missing the apparent state law deadline for certifying their presidential elector slates to the Secretary of State of Indiana, are so unusual as make it almost inconceivable that they could be replicated in the future. This court has held that a case must satisfy two tests to avoid mootness under the "capable of repetition, yet evading review" doctrine: (1) the challenged action must have been in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party would be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This test, as articulated in *Weinstein v. Bradford*, was applied by the Supreme Court in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979): "Although the first branch of the test is satisfied here, appellant has presented no evidence that the Chicago Board will repeat its allegedly unauthorized actions in the future." *Id.* 440 U.S. at 187. Similarly, the Fulani Plaintiffs in the instant case have made, and can make, absolutely no showing that anything remotely similar to the unique factual circumstances of this case is likely to occur in the future. Hence, the likelihood that the Fulani Plaintiffs will again be subject to the same actions by the State Defendants is nil.

Nor does the existence of a claim for damages revive the case. The State Defendants, of course, recognize that a claim for damages may survive a mootness attack. *Powell v. McCormack*, 395 U.S. 846 (1969). Such a claim, however, may only keep a case alive to the extent of determining whether there is

a viable damage claim. If a valid immunity defense exists, the damage claim will be barred and will not resuscitate the rest of the case. *Chase v. McMasters*, 573 F.2d 1011, 1015, 1020 (8th Cir. 1978). "A determination that the Defendants are immune likewise terminates any sustaining aid from a damages claims." 13A C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure*, §3533.3 "Mootness — Changed Circumstances," at 269 (2nd Ed. 1984). In this case, the State Defendants are sued in their official capacities only. The damage claims against them are, therefore, barred by the Eleventh Amendment to the Constitution of the United States. *Kentucky v. Graham*, 473 U.S. 159 (1985). The Fulani Plaintiffs cannot save their other claims from being mooted by the events subsequent to the filing of this case in the District Court.

The Fulani Plaintiffs may not rely on *Ex parte Young*, 209 U.S. 123 (1908), to avoid the Eleventh Amendment problem under the doctrine that a suit brought against state officials, even in their official capacities, to enjoin them prospectively from enforcing an unconstitutional statute, is not barred by the Eleventh Amendment. This Court, discussing the *Young* case, has noted that "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984). The Court specifically noted, at 465 U.S. at 102-103, that while the *Young* doctrine permitted prospective injunctive relief, it did not extend to retroactive monetary relief, 104 S.Ct. at 909, *citing Edelman v. Jordan*, 415 U.S. 651, 666-667 (1974). Thus, the damage claim is barred by the Eleventh Amendment, and the rest of the Fulani Plaintiffs' case is moot.

III. THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISION OF THE EIGHTH CIRCUIT.

The Fulani Plaintiffs admit that the decision below and the decision in *Manifold v. Blunt*, 863 F.2d 1368 (8th Cir. 1989), *cert. denied*, ____ *U.S.* ____, *110 S.Ct. 242, 107 L.Ed.2d 192 (1989)*, are not contradictory. (Page 50, Petition for Writ Cer-

tiorari). Indeed, *Manifold* dealt with an equal protection challenge to a statute requiring new parties to submit the names of their presidential electors prior to established parties. The Eighth Circuit found that such a requirement did not violate equal protection. No such statute or requirement is present in this case and the issues involved in the two cases are not relevant to one another.

Petitioners are trying to assert that, because Missouri officials chose to strictly enforce their filing deadline for the names of presidential electors, as a matter of federal law Indiana election officials must do the same. The Constitution does not require that each of the states conform to a single method and manner of selecting presidential electors. U.S. CONST. ART. II SECTION 1, CLAUSE 2. Petitioners' alleged conflict between the strict and liberal enforcement of the filing deadlines in Missouri and Indiana simply does not present a significant federal question worthy of this Court's review.

IV. PETITIONERS' ENTIRE CASE RESTED ON CONCLUSORY AND SPECULATIVE ALLEGATIONS BASED UPON A HYPOTHETICAL SET OF FACTS INSUFFICIENT TO INVOKE FEDERAL SUBJECT MATTER JURISDICTION.

The basis for every claim asserted by the Fulani Plaintiffs in this case was their conclusory, speculative and hypothetical allegation that "[u]pon information and belief, had the Fulani-Moore campaign failed to file the New Alliance Party candidates for presidential electors in a timely fashion . . ., Fulani and Moore would not have been listed on the Indiana ballot." App. 19a. The undisputed evidence shows that the New Alliance Party candidates for presidential electors *were* certified in a timely fashion and Fulani and Moore *were* listed on the Indiana ballot. The patently speculative and hypothetical nature of this core allegation demonstrates that the Complaint failed on its face to satisfy the first test of any Federal action namely, presentation of a justiciable case or controversy over

which an Article III court may constitutionally exercise subject matter jurisdiction.

To establish subject matter jurisdiction, a party must establish that an actual case or controversy exists between the plaintiff and defendant. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The controversy between plaintiffs and defendants must be more than imaginary or speculative. There must be a "live and acute controversy" to satisfy Article III standing. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The case or controversy requirement is designed to insure that the federal courts do not issue advisory opinions on situations not before the court. Federal courts may not render "an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 241 (1937). The rule against "decid[ing] abstract, hypothetical or contingent questions" is "no less strict in a declaratory judgment proceeding than in any other type of suit," *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *see also, Golden v. Zwickler*, 394 U.S. 103, 108 (1969); *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). To establish an actual controversy "the disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effects it decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Service Commission of Utah, et al. v. Wycoff Co. Inc.*, 344 U.S. 237, 244 (1952).

The hypothetical and advisory nature of the Complaint here is easily discernible. The underlying cause of action was clearly conditioned on events that had not occurred, *i.e.*, the speculative allegation that the respondents "*would* not" have put the Fulani Plaintiffs' candidates for President and Vice-President on the ballot *if* their presidential elector nominees had not been certified by August 1. In fact, the elector nominees *were* so certified and its candidates for President and Vice-President *were* on the ballot.

In most cases, the courts refused to exercise jurisdiction

because the action rested on contingent future events that had not yet occurred and might or might not take place. Here, the Fulani Plaintiffs' action rested soley on speculation about hypothetical past events that concededly did not occur, had no possibility whatever of occurring in the future, and were contradicted by the events that occurred in fact. As the District court correctly concluded:

> The plaintiffs' alleged disparate treatment is premised on a hypothetical situation. The plaintiffs request the Court to act based on the plaintiffs' beliefs of what the defendants would have done in a hypothetical situation. This case is in a somewhat peculiar posture in that most requests for advisory opinions present prospective hypothetical events. This case, however, combines retrospective or past events with a request for judgment on what might have happened if past events had occurred differently. Regardless of the timing of the hypothetical occurrences, the allegations in this suit do not present an actual case or controversy for adjudication, and thus the Court is without subject matter jurisdiction to hear the claim.

App. 22a-23a.

The Fulani Plaintiffs have framed the question that they wish to present to this Court as one concerning the alleged misapplication of laches by the Seventh Circuit to bar declaratory relief. This question, especially in this case, is simply not worthy of this Court's consideration. The reasons and arguments that petitioners advance in favor of granting the writ rest on conclusory and speculative allegations based upon a hypothetical state of facts which is insufficient to invoke federal jurisdiction under Article III of the Constitution. This case is clearly not worthy of review by this Court.

V. PETITIONERS FAILED TO PRESENT ANY CIRCUMSTANCES OR FACTS THAT WOULD ESTABLISH A VIOLATION OF THEIR CIVIL RIGHTS OR OTHERWISE PRESENT A SIGNIFICANT QUESTION OF FEDERAL LAW.

The Fulani Plaintiffs failed to allege any particularized facts to support their conclusory allegation of civil rights deprivations by the State Defendants. Nor could the Fulani Plaintiffs possibly allege any particularized facts, as the basis for all of their claims was pure speculation about what the State Defendants might have done given a totally different set of facts. The District Court properly concluded below that the Fulani Plaintiffs "failed to allege any facts with the particularity of intentional and purposeful discrimination sufficient to invoke the equal protection clause." App. 26a.

This Court previously stated in *Snowden v. Hughes*, 321 U.S. 1 (1944):

> The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.* *Id.* 321 U.S. at 8.

This Court went on to state:

> The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "willful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequences of the failure to certify, other than that petitioner has been deprived of the nomination and election.

Id. 321 U.S. at 10.

The Fulani Plaintiffs' conclusory allegations about the hypothesized conduct of the State Defendants does not allege the type of invidious discrimination necessary to state a claim for a violation of the equal protection clause under 42 U.S.C. §1983. *Snowden, supra; see also Baum v. Lundig*, 535 F.2d 1016, 1019 (7th Cir. 1976); *Gamza v. Aquirre*, 619 F.2d 449, 454 (5th Cir. 1980).

Leaving aside the hypothetical nature of the allegations, it is clear that the Fulani Plaintiffs did not begin to allege, much less "with particularity," any "intentional and purposeful, overt actions" by the State Defendants that could establish the requisite "element of intentional or purposeful discrimination." Nowhere was there any allegation of any specific facts showing that the State Defendants, in certifying the Republican and Democratic Party Candidates for presidential electors, were intentionally or purposefully discriminating against the Fulani Plaintiffs on the basis of race, sex, national origin, political belief or any other invidious classification conceivably redressable *via* a §1983 action. Nor were there any facts alleged to support any alleged violation of the Fulani Plaintiffs' rights under the First Amendment.

Furthermore, as noted by the District Court, the equal protection claims were without merit because "[t]he Equal Protection Clause only guarantees like treatment to persons similarly situated." App. 23a. Because the presidential elector nominees of those parties involved were not certified at the same time (either all before or all after August 1), the Fulani Plaintiffs' elector nominees were not similarly situated to their major party counterparts for the purposes of an equal protection claim. Had the Republican, Democratic and New Alliance Party presidential elector candidates all been certified on the same date, and had the State Defendants put the major party but not the minor party candidates on the ballot, a complaint alleging equal protection and similar claims might have stated a claim upon which relief could be granted. But it is clear that these events did not take place.

Aside from the hypothetical nature of the claims, the Fulani Plaintiffs misinterpret and misstate Indiana election law. They alleged that "[t]he Indiana cases insist on strict enforcement of filing deadlines and other ballot access deadlines." (Page 39 of Petition for Writ of Certiorari). Petitioners also made this claim below.

Indiana courts would not have necessarily treated the slight delay in advising the Secretary of State of the identity of already duly nominated Republican and Democratic presidential elector candidates (whose names did not even appear on the Indiana ballot) as grounds for precluding Indiana citizens from voting for either of the major party candidates for President and Vice-President in the 1988 Election.

The Indiana Supreme Court has held that an election official's acceptance of candidate filings that fail to comply strictly with statutory requirements will effectively cure the defect if the underlying purposes of the law are fulfilled:

> The town clerk, acting as [the election] board, might doubtless have refused to accept the [nomination] certificate until rendered in due form, *but, having accepted it without objection, and as satisfactory to him, the purpose of the law was fulfilled. It enabled him to place upon the official ballot the names of the several candidates that had actually been nominated*, and which of right should have been placed there; *and, the correct result having been reached, the form of procedure becomes unimportant.*

Jones v. State ex rel. Wilson, 153 Ind. 440, 448-49, 55 N.E. 229, 232 (1899). In the present case, the Indiana Secretary of State likewise accepted "without objection" and as "satisfactory" the certifications of the major party presidential elector candidates "that had been actually nominated" (in this case by their respective State Party Conventions). And, since the names of candidates for electors did not even appear on the Indiana ballot, it is abundantly clear that his doing so fulfilled "the purpose of the law"; *i.e.*, ensuring that elector candidates had in fact been nominated for the Presidential and Vice-Presiden-

tial candidates whose names did appear on the ballot.

Furthermore, Indiana law is clear that even those requirements that may be considered "mandatory" if a challenge is brought *before* election officials have placed a candidate's name on the ballot will not be so viewed *after* ballots are prepared:

> In an action against [election officials], brought before an election, involving the names of the candidates *to be placed* on the ballot by them, the statutory provisions referred to are treated as mandatory, and they will be enjoined from *placing* a name upon the ballot that had not been submitted to them pursuant to the statute, *but after the election commissioners have acted and placed a name upon the ballot*, and after the election, *the provisions of the statue are considered directory only, and the names of candidates will be treated as having been legally placed upon the ballot* by the election board "unless an essential element of the election is affected, or there is an express declaration in the statute that the act is essential to a valid election, or that its omission will render the election void."

Lumm v. Simpson, 207 Ind. 680, 683-84, 194 N.E. 341, 342 (1935) (emphasis added; citations omitted). In this case, the State Defendants had already placed the names of the Republican and Democratic candidates for President and Vice-President on the Indiana ballot. Indeed, since absentee voting in Indiana started before the regular polling date, the 1988 Election was already underway in Indiana when this action was filed.[4]

[4] Plaintiffs' insistence that every provision of every Indiana election statute demands rigid and literal compliance in every circumstance is not advanced by their reliance on *Manifold v. Blunt*, 863 F.2d 1368 (8th Cir. 1988) *cert. denied*, 110 S.Ct. 242 (1989).

The holdings in *Manifold* and similar Federal cases, that a State's strict enforcement of a given election law requirement may be constitutionally *permissible*, scarcely supports any proposition that strict enforcement of the literal requirements of the Indiana filing provision Plaintiffs sought to put at issue here is somehow constitutionally *required*.

Furthermore, the decisions of State officials in Missouri or in any other State other than Indiana about the election statutes of those States have no bearing in any event on the decisions of Indiana State officials on the proper interpretation and application of Indiana election statutes.

Indiana cases also emphasize that the purpose of Indiana election laws is to ensure that voters have a free and fair opportunity to express their collective will, and that election statutes will be liberally construed to achieve that objective:

> the purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement. In the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose.

State ex rel. Harry v. Ice, 207 Ind. 65, 71, 191 N.E. 155, 157 (1934). *Accord, eg., Lumm v. Simpson, supra*, 207 Ind. at 683, 194 N.E. at 342; *Jones v. State ex rel. Wilson, supra*, 153 Ind. at 446, 55 N.E. at 231. Indeed, it is most likely that the Indiana courts would reject, as inimical to the fundamental election law purpose of giving the electorate a free opportunity to choose its political leaders, a draconian statutory construction that would have required the removal of George Bush and Michael Dukakis from the ballot.

If there remains any doubt as to how the Indiana Courts would resolve the state law issue, the Federal Courts must then abstain from deciding the issue under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

The Fulani Plaintiffs failed to allege any facts to establish a violation of their civil rights under either the First or the Fourteenth Amendments or otherwise present a significant question of federal law. Therefore, the Petition for Writ of Certiorari to the Seventh Circuit should be denied, as the District Court correctly decided the case below even if the Seventh Circuit erred in its laches determination.

CONCLUSION

For the foregoing reasons, respondents respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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